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APPLICATION OF

OLD DOMINION ELECTRIC COOPERATIVE

CASE NO. PUE010303

**For a certificate of public convenience
and necessity for electric generation
facilities in Louisa County**

HEARING EXAMINER'S RULING

March 8, 2002

On February 6, 2002, a Hearing Examiner's Ruling was issued finding that the record in this case should be reopened to provide the applicant an opportunity to offer additional evidence on certain limited issues. That ruling was a direct response to the Commission's decision to remand another case¹ to receive additional evidence on certain issues similar to those raised by public witnesses in this case.

On February 28, 2002, Old Dominion Electric Cooperative ("ODEC") filed a Motion for Reconsideration. It complains that it knows of no other proceeding in which a Hearing Examiner reopened a record absent a request from any party although it acknowledges that "there was a somewhat extraordinary Commission order issued" after the hearing was held in this case.² ODEC maintains that such action to reopen the record "sets an ill-advised precedent for future proceedings" before Hearing Examiners.³ It requests that the record not be reopened, because this would cause further delay. ODEC contends that an expeditious decision on its application is critical because the proposed generation facility is needed to support the requirements of ODEC members by May of 2003. It maintains that each of the issues identified in the ruling was raised by "less than credible testimony"⁴ and has been adequately addressed in the existing record.

Staff filed its response on March 6, 2002. Staff countered that public witness testimony is credible testimony and a part of the record, that ODEC had an opportunity to cross-examine the public witnesses but declined to do so, and that it is within the discretion of the Hearing Examiner to reopen the record and is consistent with the *Tenaska* precedent. Staff also advised that it did not anticipate that its recommendation to approve the proposed facility would change. Staff observed that a comprehensive cumulative impact study had been filed in *Tenaska* that analyzes the air quality impact in and around

¹ *Application of Tenaska Virginia Partners, L.P. for approval of a certificate of public convenience and necessity pursuant to Virginia Code § 56-265.2, an exemption from Chapter 10 of Title 56, and interim approval to make financial commitments and undertake preliminary construction work, Case No. PUE010039, Order (January 16, 2002) ("Tenaska").*

² Motion at 4.

³ *Id.*

⁴ *Id.*

Fluvanna County including the ODEC proposed facility.⁵ Additionally, Staff advised that the Department of Environmental Quality (“DEQ”) issued a letter to the Commission on March 1, 2002, accepting the Tenaska study as reasonable. Staff, however, took no position on whether the ODEC motion should be granted.

The ruling to reopen the record in this case was intended to allow the applicant an opportunity to offer evidence on issues raised in this case by public witnesses, that were deemed critical to approval by the Commission in *Tenaska*. I concluded that ODEC should be afforded such an opportunity since it could not have anticipated the criteria for consideration of proposed generation facilities established in *Tenaska*, with particular note for the breadth of concern with the cumulative air impact of a proposed facility. However, ODEC as applicant has the burden of proving its case, and it does not want the opportunity to offer additional evidence to address those issues. Although ODEC could have offered the Tenaska study as evidence on cumulative air impact in this case, I can not take judicial notice of evidence offered in another case. Therefore, I will evaluate the application based on the record before me, and advise the Commission if I conclude that the record does not support the required findings on the criteria established in *Tenaska*. ODEC’s motion is hereby granted. Accordingly,

IT IS DIRECTED THAT the ruling dated February 6, 2002, establishing a further procedural schedule is vacated, and the hearing set for April 2, 2002, in this case is canceled.

Deborah V. Ellenberg
Chief Hearing Examiner

⁵Staff Response at 5.